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14 WILLIAM TAYLOR

15 **UNLIMITED JURISDICTION**

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **FOR THE COUNTY OF LOS ANGELES**

18 WILLIAM TAYLOR,

19 Plaintiff,

20 vs.

21 CITY OF BURBANK and DOES 1 through
22 100, inclusive,

23 Defendants.

24) **CASE NO. BC 422 252**

25) **[Assigned to John Shepard Wiley, Jr.,
26 Judge, Dept. "50"]**

27) **NOTICE OF MOTION AND MOTION
28 FOR DISCOVERY OF PEACE OFFICER
PERSONNEL AND OTHER RECORDS
REGARDING THE INVESTIGATION OF
THE BURBANK POLICE
DEPARTMENT CONDUCTED BY
MERRICK BOBB; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF GREGORY W.
SMITH**

29) **Date: January 12, 2011
30 Time: 8:30 a.m.
31 Dept.: "50"**

32) **Action Filed: September 22, 2009**

33 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD, AND TO**
34 **THE CITY OF BURBANK, AND THE CITY OF BURBANK POLICE DEPARTMENT:**

1 **PLEASE TAKE NOTICE** that on January 12, 2011 at 8:30 a.m. in the Los Angeles
2 County Superior Court, 111 N. Hill Street, Department "50," Los Angeles, California
3 90012, Plaintiff William Taylor (hereafter "plaintiff") will move for an order that Defendant
4 City of Burbank ("defendant") and the Burbank Police Department ("BPD") produce
5 certain records regarding an investigation conducted by Merrick Bobb regarding the
6 Burbank Police Department, more specifically the evaluation of the Burbank Police
7 Department following the allegations in Porto's and the termination of plaintiff, pursuant to
8 *Evidence Code* §§ 1043 and 1045.

10 Plaintiff requests the following:

- 11 1) A complete copy of the report concerning the Burbank Police Department
12 ("Report") prepared by Mr. Bobb;
- 13 2) All documents pertaining to the report prepared by Bobb, including but not
14 limited to, documents prepared by any city official concerning their conclusions or
15 assessments of the Report, requests for the Report, and any documents reflecting the
16 statements about the Report;
- 17 3) All documents and/or statements by any BPD Officers made directly or
18 indirectly to Mr. Bobb that were either used or discarded for the Report prepared by Bobb;
- 19 4) All documents pertaining to allegations and/or statements by any agent
20 and/or employee of the City of Burbank and/or the BPD concerning the Report;

21 The proceedings at which disclosure are sought include the depositions and/or
22 other discovery proceedings, mediation, trial, appeal, and other proceedings in this action.
23 Plaintiff is informed and believes that the City of Burbank and/or the Burbank Police
24 Department are in possession of the requested Pitchess and other documents, and
25 routinely create and maintain such documents in the course of business. The further
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1 ~~verified responses and documents are requested to be produced within fifteen (15) days~~
2 of the date of the hearing of this matter.
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4 Dated: December 1, 2010

LAW OFFICES OF GREGORY W. SMITH

6 By:



7 GREGORY W. SMITH
8 Attorneys for Plaintiff
9 WILLIAM TAYLOR
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This is a whistleblower retaliation pursuant to *Labor Code* Section 1102.5 and an employment retaliation case under the Fair Employment and Housing Act ("FEHA") brought by plaintiff William Taylor ("plaintiff"), the former Burbank Police Department ("BPD") Deputy Chief of Police of the BPD. Prior to the retaliatory acts and other misconduct perpetrated against him by the defendant, plaintiff had been employed as a sworn peace officer with the BPD for over twenty five years and progressed steadily through the ranks of the BPD to the rank of Deputy Chief of Police, the second highest rank in the BPD.

Upon information and belief, Plaintiff contends that the City of Burbank hired Merrick Bobb, an independent investigator, to investigate the Burbank Police Department concerning allegations of excessive use of force (including the Porto's Robbery), which allegations were ultimately used to terminate Plaintiff.

Upon information and belief, Plaintiff contends that the Bobb Report will provide evidence regarding Plaintiff that will show his termination was retaliatory.

II. PLAINTIFF AND HIS COUNSEL SHOULD BE PROVIDED THE BOBB REPORT AND OTHER DOCUMENTS REGARDING THE INCIDENTS AT ISSUE IN ORDER TO: A) CORROBORATE THAT PLAINTIFF ENGAGED IN ACTIVITIES PROTECTED BY *LABOR CODE* SECTION 1102.5; B) CORROBORATE THAT THE CITY OF BURBANK ENGAGED IN CONDUCT THAT VIOLATED STATE AND/OR FEDERAL LAW, INCLUDING BUT NOT LIMITED TO THE TERMINATION OF PLAINTIFF; C) ESTABLISH THAT PLAINTIFF WAS SUBJECTED TO RETALIATION BY DEFENDANT AS PROHIBITED BY *LABOR CODE* SECTION 1102.5; D) REBUT DEFENDANT'S ALLEGED REASON FOR TAKING THE ADVERSE ACTIONS AT ISSUE AGAINST PLAINTIFF; E) AND TO ALLOW PLAINTIFF AND PLAINTIFF'S COUNSEL TO PREPARE FOR DEPOSITIONS AND TRIAL, AND TO BE ABLE TO IMPEACH THE TESTIMONY AND REFRESH THE RECOLLECTIONS OF WITNESSES, AS HAS BEEN SPECIFICALLY FOUND PROPER IN THE *HAGGERTY V. SUPERIOR COURT* CASE

1 In *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1089, the court
2 specifically held that disclosure pursuant to the Pitchess procedure of investigative
3 materials regarding the incident at issue in the civil case against a deputy sheriff, including
4 internal affairs interviews, transcripts, and other data, was proper. Here, similarly, the
5 Court should order the production of all relevant reports, investigative materials,
6 interviews, transcripts, and other data regarding the investigation and disposition of any
7 complaints of misconduct allegedly involving plaintiff along with any follow-up investigation
8 by any independent sources.

10 Here, as in *Haggerty v. Superior Court*, *supra*, 17 Cal.App. 4th at 1089 - 1091, the
11 facts gleaned from the internal investigations by Mr. Bobb at issue are directly relevant to
12 the matters at issue in the lawsuit. Moreover, as in *Haggerty*, the requested discovery is
13 important, not only for determining the events that occurred during the incidents, but also
14 for plaintiff's counsel to prepare effective cross-examination of defense witnesses,
15 including to impeach witnesses whose testimony at trial differs from statements made to
16 the investigating officers and/or to refresh the recollections of these witnesses. (See
17 *People v. Hustead* (1999) 74 Cal.App.4th 410, 417; see also, *People v. People v. Memro*
18 (1985) 38 Cal.3d 658, 677 ["one legitimate goal of [*Pitchess*] discovery is to obtain
19 information 'for possible use to impeach or cross-examine an adverse witness.]" See also,
20 *Garden Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4th 430, 433.

23 Plaintiff is therefore entitled to the requested information not only to use as
24 substantive evidence to establish that defendant's alleged reasons for the adverse
25 employment actions at issue are pretextual, but also to use to impeach the testimony
26 and/or refresh the recollections of defense and other witnesses. As in *Haggerty*, the
27 investigations at issue concern the very incidents that are the subject of the civil claim.
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1 Additionally, as in *Haggerty*, the privacy concerns of defendant and its employees are
2 diminished because they are the persons and/or entities whose conduct is at issue in the
3 litigation, and the requested internal investigation records concern their actions that are
4 alleged to be wrongful and will be fully litigated at trial.

5
6 Because of the direct relevance of the information, courts have recognized that the
7 law enforcement records of the investigations of the matters at issue in the case are
8 discoverable and have never imposed any special limitations on this disclosure if the
9 requested discovery otherwise meets the statutory criteria. (See *Robinson v. Superior*
10 *Court* (1978) 76 Cal.App.3d 968, 978 - "[a]ll statements made by percipient witnesses
11 and witnesses ... related to the incident in question ... are discoverable under the
12 standards set forth in *Pitchess*" ; see also *People v. Alexander* (1983) 140 Cal.App.3d
13 647, 659, disapproved on another point in *People v. Swain* (1996) 12 Cal.4th 593.

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15 Further, the *Haggerty* court also rejected the contention that the disclosure of
16 relevant internal affairs records would have a chilling effect on every law enforcement
17 agency's ability to conduct an uninhibited, thorough and candid analysis of a complaint,
18 finding such concerns speculative. The court noted that the question of whether police
19 investigation records are discoverable has been unequivocally answered in the affirmative
20 by the Legislature in enacting the *Pitchess* statutory scheme, and that the *Pitchess*
21 "legislation was intended to balance the need of criminal defendants [and civil litigants] to
22 relevant information and the legitimate concerns for confidentiality of police personnel
23 records." *People v. Breaux* (1991) 1 Cal.4th 281, 312. The court held that in balancing
24 these interests, the Legislature made a decision that relevant evidence contained in a
25 personnel file, including internal investigation records and reports, should be disclosed
26 upon a proper showing of materiality and relevance, and did not provide any blanket
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1 exceptions to the discoverability of such reports, particularly in the civil context. *Haggerty*
2 *v. Superior Court, supra*, 17 Cal.App. 4th at 1091 - 1092.

3 Here, a plausible foundation exists to conclude that plaintiff was subjected to
4 retaliation by defendant for engaging in activities protected by *Labor Code* Section 1102.5
5 and FEHA. The information and documents sought are directly relevant and material to
6 plaintiff's contentions that: a) plaintiff engaged in activities protected by *Labor Code*
7 Section 1102.5 (i.e., reported and opposed the illegal conduct of Rosoff and the
8 defendant, and attempted to file and/or filed a complaint, testified, or assisted in
9 investigations regarding such illegal conduct); b) was subjected to adverse employment
10 actions, up to and including termination, for engaging in such protected activities; and c)
11 to establish the reason given for the retaliatory actions by defendant are false, a sham,
12 and simply a pretext for retaliation. As such, the records pertaining to the investigations
13 by Mr. Bobb are relevant and material. The information and documents sought should be
14 disclosed to plaintiff. In the alternative, such information and documents should be
15 examined by the court *in camera*, and all evidence relevant to plaintiff's claims should be
16 turned over to plaintiff's counsel.

19 **III. PLAINTIFF IS ENTITLED TO DISCLOSURE OF THE REQUESTED**
20 **DOCUMENTS**

21 **A. Peace Officer Personnel Records Are Expressly Discoverable Pursuant**
22 **to *Evidence Code* §1043(a) and 1045(a)**

23 *Evidence Code* §1043 and 1045(a) provide that if the personnel records and
24 information contained therein are relevant to the subject matter of the litigation, upon
25 motion by the party seeking the records and information there is a right of access to the
26 records of complaints, investigations of complaints, and discipline imposed as a result of
27 such investigations.
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1 *Evidence Code* §1045(a) provides as follows:

2 **"(a) Nothing in this article shall be construed to affect the right of access to**
3 **records of complaints, or investigations of complaints, or discipline imposed**
4 **as a result of such investigations, concerning an event or transaction in**
5 **which the peace officer participated, or which he perceived, and the manner**
6 **in which he performed his duties, provided that such information is relevant**
7 **to the subject matter involved in the pending litigation. (Emphasis added)**

8 This subdivision is "expansive." *Fletcher v. Superior Court* (2002) 100 Cal.App.4th
9 386, 399. In particular, "relevant information" under *Evidence Code* Section 1045 is not
10 limited to facts that may be admissible at trial, but may include facts that could lead to the
11 discovery of admissible evidence. *People v. Memro, supra*, 38 Cal.3d at 681-682; *People*
12 *v. Husted, supra*, 74 Cal.App.4th at 423.

13 Under the statutory scheme, a party seeking discovery of a peace officer's
14 personnel records need only file a written motion describing the type of records sought,
15 supported by "[a]ffidavits showing good cause for the discovery... , setting forth the
16 materiality thereof to the subject matter involved in the pending litigation and stating upon
17 reasonable belief that the governmental agency identified has the records or information
18 from the records." (*Evidence Code* § 1043(b)(3).) This initial burden is a "relatively
19 relaxed standard." *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.
20 Information is material as defined by *Evidence Code* § 1043(b)(3) if it 'will facilitate the
21 ascertainment of the facts and a fair trial.' "[A] declaration by counsel on information and
22 belief is sufficient to state facts to satisfy the 'materiality' component of that section." *Abatti*
23 *v. Superior Court* (2003) 112 Cal.App.4th 39, 51.

24 In *Santa Cruz v. Municipal Court, supra*, 49 Cal.3d 88 - 89, the California Supreme
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1 Court held that personal knowledge is not required by *Evidence Code* 1043(b) and that an
2 affidavit on information and belief is sufficient. The Court found that in the context of
3 Pitchess motions, the Legislature had expressly considered and rejected a requirement of
4 personal knowledge. The Court held that the legislative history, the case law background,
5 and the statutory language all point to the same conclusion: the "materiality" component
6 of *Evidence Code* § 1043(b) may be satisfied by affidavits based on information and
7 belief. (49 Cal.3d at 89.)

9 In *Abatti v. Superior Court, supra*, 112 Cal.App.4th 39, the *Pitchess* motion
10 contained an affidavit of counsel that related statements from other officers that the former
11 officer had been asked to leave, and had been the subject of other complaints, and was
12 labeled a "liability" problem for the department. *Id.* at 46-47. The court considered
13 counsel's affidavit sufficient, even though it merely averred the contents of the counseling
14 memos rather than stating with specificity the evidence which was contained therein. The
15 court reasoned that to require such "specificity" in the *Pitchess* process would place the
16 proponent of the motion in a "Catch-22" position of having to allege with particularity the
17 very information he or she is seeking. *Id.* at 47, fn. 7.

19 **IV. THE INFORMATION AND DOCUMENTS SOUGHT ARE RELEVANT AND**
20 **DISCOVERABLE, AND RELATE DIRECTLY TO DISPUTED ISSUES IN THIS**
21 **CASE**

22 Relevance is defined by *Evidence Code* § 210, which provides that:

23 "Relevant evidence" means evidence, including evidence relevant to the credibility
24 of a witness or hearsay declarant, having any tendency in reason to prove or
25 disprove any disputed fact that is of consequence to the determination of the
26 action."

27 Relevance to the subject matter is to be broadly construed and is not limited to
28 relevance to the narrow issues of the case. *Greyhound Corporation v. Superior Court*
(1961) 56 Cal.2d 355, 378, 390. As set forth above, in the *Pitchess* motion context, a

1 declaration by counsel on information and belief is sufficient to state facts to satisfy the
2 'materiality' component of *Evidence Code* § 1043(a). *Abatti v. Superior Court, supra*, 112
3 Cal.App.4th at 51; *Haggerty v. Superior Court, supra*, 17 Cal.App. 4th at 1086.

4 Here, there is a reasonable basis to conclude the Bobb Report at issue contains
5 information that is relevant and material to the lawsuit. (See *Robinson v. Superior Court,*
6 *supra*, 76 Cal.App.3d at 977 [noting that the relevancy of an investigation of the incident
7 that is the basis for the lawsuit is "self-evident"]. Indeed, the records requested involve
8 the investigations of the very matters in which plaintiff has asserted he engaged in the
9 protected activities for which plaintiff contends that he was retaliated against by
10 defendant, and are therefore directly relevant to the allegations in this case. Further, such
11 documents, including the statements taken of witnesses during Bobb's investigations, are
12 evidence relevant to the credibility of the witnesses.

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14 It is unfair, unjust, and inequitable for defendant and its counsel to have access to
15 this information and materials, to rely upon same in denying plaintiff's allegations, and to
16 utilize same to prepare for deposition and trial, and to deny plaintiff's counsel access to
17 the same information and documents. *Evidence Code* Sections 1043 and 1045 are not
18 intended to provide public entities and law enforcement agencies with an unfair advantage
19 in defending civil actions. A public entity cannot invoke these code sections to withhold
20 evidence relevant to the case. *Garden Grove Police Dept. v. Superior Court, supra*, 89
21 Cal.App.4th at 433; c.f. *People v. Memro, supra*, 38 Cal.3d at 679. As the court stated in
22 *Gill v. Manuel* (9th Cir. 1973) 488 F.2d 799, 803, *Evidence Code* §1040 is not "intended to
23 provide a shield behind which law enforcement personnel may seek refuge for possible
24 wrongdoings."

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27 **V. PLAINTIFF HAS DEMONSTRATED GOOD CAUSE FOR THE PRODUCTION OF**
28 **THE REQUESTED INFORMATION AND DOCUMENTS**

1 The declaration submitted herewith contains facts that establish a plausible
2 foundation to conclude that defendant engaged in retaliation against plaintiff. The Bobb
3 Report appears to directly address the issues concerning the incidents regarding Porto's
4 and other use of force incidents culminating in the termination of plaintiff's employment
5 with defendant. As such, the facts regarding these matters, which are of consequence to
6 the determination of this action, are disputed between the parties, and the requested
7 information, documents, and items are relevant and discoverable in regard to such
8 disputed issues.


10 **VI. CONCLUSION**

11 For each of the foregoing reasons, it is respectfully requested that the Court enter an
12 order directing the defendant to produce the records described in this motion for in
13 camera inspection by the Court and subsequent production to plaintiff.
14

16 Dated: December 1, 2010

LAW OFFICES OF GREGORY W. SMITH

17
18 By:



GREGORY W. SMITH
Attorneys for Plaintiff
WILLIAM TAYLOR

“DECLARATION”

DECLARATION OF GREGORY W. SMITH

I, Gregory W. Smith, do declare as follows:

1. I am an attorney at law licensed to practice in the State of California and one of the counsel of record for plaintiff herein. This declaration is made in support of plaintiff's motion to discover a Report, and other items connected to the Report, prepared by Merrick Bobb as an independent investigator hired by the City of Burbank to conduct an investigation concerning use of force by the Burbank Police Department. Except where otherwise indicated, I have personal knowledge of the following, and if called to testify regarding same I could and would competently testify thereto.

2. This is a whistleblower retaliation pursuant to *Labor Code* Section 1102.5 and an employment retaliation case under the Fair Employment and Housing Act ("FEHA") brought by plaintiff William Taylor ("plaintiff"), the former Burbank Police Department ("BPD") Deputy Chief of Police of the BPD. Prior to the retaliatory acts and other misconduct perpetrated against him by the defendant, plaintiff had been employed as a sworn peace officer with the BPD for over twenty five years and progressed steadily through the ranks of the BPD to the rank of Deputy Chief of Police, the second highest rank in the BPD.

3. Upon information and belief, Plaintiff contends that the City of Burbank hired Merrick Bobb, an independent investigator, to investigate the Burbank Police Department concerning allegations of excessive use of force (including the Porto's Robbery), which allegations were ultimately used to terminate Plaintiff.

4. Upon information and belief, Plaintiff contends that the Bobb Report will provide evidence regarding Plaintiff that will show his termination was retaliatory.

5. Plaintiff contends in this action that from in or around April 2008 through May

1 a. A complete copy of the written report prepared by Merrick Bobb, and any
2 documents or statements used in the generation of Bobb's report.
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4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct.
6

7 Executed this 1st day of December, 2010, at Beverly Hills, California.
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Gregory W. Smith
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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is 9100 Wilshire Boulevard, Suite 345E, Beverly Hills, California 90212.

On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Beverly Hills, addressed as follows:

DATE OF SERVICE : December 2, 2010

DOCUMENT SERVED : NOTICE OF MOTION AND MOTION FOR
DISCOVERY OF PEACE OFFICER PERSONNEL AND
OTHER RECORDS REGARDING THE
INVESTIGATION OF THE BURBANK POLICE
DEPARTMENT CONDUCTED BY MERRICK BOBB;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF GREGORY W SMITH

PARTIES SERVED : SEE ATTACHED SERVICE LIST.

XXX (BY REGULAR MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Beverly Hills, California. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

XXX (BY ELECTRONIC MAIL) I caused such document to be electronically mailed to **Christopher Brizzolara, Esq.** at the following e-mail address: samorai@adelphia.net.

XXX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

— (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Beverly Hills, California on December 2, 2010.

Selma I. Francia

SERVICE LIST

**WILLIAM TAYLOR v. CITY OF BURBANK
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC 422 252**

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Attention: Chief's Office
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